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THE TEXAS SUPREME COURT TASK FORCE IN INTERNATIONAL LAW PRACTICE: MAKING TEXAS MORE COMPETITIVE IN INTERNATIONAL LAW

*Larry Pascal**

I. INTRODUCTION

THE Texas Supreme Court has recently published for comment rule changes that largely adopt the unanimous recommendations of the Texas Supreme Court Task Force on International Law Practice (the "Reforms"). The Reforms address three primary areas: (a) eligibility of foreign lawyers to sit for the Texas Bar Exam (primarily designed for licensed foreign lawyers who have graduated from an accredited law school in their home country and complete an LL.M. at an ABA accredited law school); (b) the foreign legal consultant ("FLC") certification for foreign lawyers who wish to solely practice the law of their home country while working in Texas; and (c) the *pro hac vice* rule permitting a foreign lawyer to appear in a Texas court proceeding upon application to the judge and with the presence of Texas counsel. The Reforms would make Texas competitive with New York and California, the perennial leaders in this area, and create expanded commercial opportunities for Texas lawyers.

II. CHARGE AND COMPOSITION OF TASK FORCE

The Texas Supreme Court charged the Task Force with the following three primary tasks: (1) clarify relevant issues; (2) study recent developments in law related to foreign trained lawyers; and (3) modernize existing criteria to meet the needs of international law practice in Texas.

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The Task Force consisted of a diverse cross section of attorneys, including lawyers from private law firms, in-house legal departments, and academia, as well as representatives of the Texas Board of Law Examiners ("BLE"), State Bar of Texas, and Texas Unauthorized Practice of Law Committee. These diverse perspectives were essential, as rule revisions had to be drafted to function with bar rules and practices around the world. Task Force meetings were held in Austin and both staff of the Supreme Court and a Justice of the Texas Supreme Court attended many of the meetings. The Task Force worked for over three years on the project, tendering its report to the Supreme Court in December 2012. The Task Force recommendations were adopted unanimously.

III. HOW ADOPTION OF THE REFORMS WILL HELP TEXAS LAWYERS

The Reforms will position the Texas legal community to take advantage of its strengths in key economic areas (e.g., energy, technology, transportation, manufacturing, etc.) and better compete for and attract lucrative cross-border legal work.¹ The Reforms would enable lawyers in the state to better compete with New York, California, national law firms, and international law firms for coveted international transactional, litigation, and administrative work by offering access to foreign legal systems from their Texas platforms.² Companies based in the state would also benefit by more easily being able to retain foreign legal talent (whether licensed in Texas or as FLCs) to support their cross-border trade and investment operations. In addition, law schools based in the state would also benefit from an expected increase in enrollment for their LL.M. programs.

IV. THE LL.M. MARKET FOR INTERNATIONAL LAWYERS AND HOW IT WORKS

The aspect of the Reforms that pertains to the ability of foreign lawyers to sit for the Texas Bar exam depends significantly on the LL.M. programs³ that ABA accredited programs in the US operate and the eco-

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1. A common misperception is that international law is only for large law firms and companies and that small and mid-size law firms would not benefit from cross-border trade and commerce. However, my sense is that the Reforms would also benefit small and mid-size law firms in the state who see cross-border opportunities, but are restrained by outdated, ambiguous, or burdensome bar rules and have less resources and familiarity to overcome them than larger firms.
 2. Foreign associates working in the US typically serve as a legal, cultural, and linguistic bridge or intermediary and assist clients to better understand local law and culture, rather than a resource on US law. For important engagements with their home country, they typically work with their home country law firms on important matters.
 3. Tuition for LL.M. programs is substantial. For example, the University of Texas School of Law, considered one of the best values in American legal education, offers an international LL.M. program. For the 2013-2014 year, foreign applicants applying as non-residents pay an estimated US\$63,060 for tuition, room and board, books, and related expenses and the law school website notes that scholarships and

conomic model that supports them. In essence, due to the quality of the American law school experience and the desire to have an understanding of the U.S. legal system, talented lawyers from around the world commonly interrupt their law careers after 3-6 years of work experience, and leave their law firms in their home countries in order to pursue an LL.M. in the US and then possibly work as a foreign associate for up to one year with a correspondent firm in the U.S. before returning to their home country.⁴ These foreign lawyers, many for whom English is a second language, typically seek to sit for the New York Bar, and return home with that coveted combination of a New York law degree and some work experience with a U.S. firm. For those few and talented foreign attorneys who can achieve this, these achievements become important and marketable career accomplishments that position them well for ultimate promotion in their respective law firm, company in-house position, or governmental post in their home country. For the US law firms that host them for this one-year term, the firms become more competitive in winning cross border work, gain important ongoing market insight, and develop a loyal set of alumni abroad well positioned to work with them or refer them work in the years to come.

V. THE TEXAS POTENTIAL AND PARADOX

Texas' geographic, demographic, and economic characteristics place it in an enviable position for advancements in international law. For example, Texas' close proximity to Latin America makes it an attractive trade partner to many Latin American countries, such as Mexico and Brazil.⁵ Texas has also been very successful in attracting foreign investment in the energy sector and various other industries (e.g., technology), and it enjoys broad diversification in terms of its foreign trade partners.⁶ Finally, Texas

financial aid are generally not available. The UT Law School website also notes that the LL.M. entering class has 47 students from 17 countries. Foreign law firms sometimes offer their best lawyers some form of financial assistance to study abroad and obtaining an LL.M. is viewed as a rite of passage for partners in prominent foreign law firms in many parts of the world.

4. It is relatively easy to transition from an educational visa to an optional practical training ("OPT") work authorization. OPTs are not however available for self-employment and if a foreign lawyer wishes to remain beyond that one year OPT authorization period, he or she would have to convince his/her employer to typically obtain on his/her behalf an H-1B visa, which is subject to annual caps, requires a significant advance application period in order to have a viable chance with the cap without job interruption, and costs approximately US\$5,000 in legal fees and filing fees. In my experience, only a tiny and exceptional minority of the foreign lawyers who come to the US either wish or are able to find employment beyond the OPT work experience. Moreover, due to the relatively small job market for LL.M.s, only a small minority of LL.M. graduates get the opportunity to work in the US on a long term basis.
5. Texas' top trading parties are in fact quite geographically diversified and include countries from Asia, Europe, and Latin America. A recent example of the importance of foreign direct investment is the decision of Toyota to move its US headquarters to the Dallas-Fort Worth area.
6. See website of Texas Economic Development & Tourism at www.governor.state.tx.us/ecodev/.

has more than 2,000 foreign multinational organizations established in the state, and is the headquarters of many Fortune 500 companies.⁷

Despite its size and economic potential, Texas paradoxically lags significantly behind New York and California (and for that matter many other smaller states with far lower levels of international commerce) in the international law area as to foreign lawyers sitting for their respective bars.⁸ This is due to outdated and restrictive eligibility rules that make qualifying to sit for the Texas Bar too difficult, costly, and uncertain, and most foreign LL.M. candidates opt instead to apply to the New York Bar, which offers more reliability and a more recognized international brand. As of now, the number of foreign lawyers seeking to take the Texas bar exam remains extremely low. In a typical year, between ten and twenty foreign-educated applicants sit for the Texas bar exam, compared to approximately 4,000 plus foreign applicants who sit for the New York bar exam. California typically has approximately 600 foreign lawyers per year registered to sit for the bar. The current arrangement effectively allows New York to serve as the *de facto* bar for the entire foreign lawyer community in the country and these bar dues all flow to Albany (not to mention the greater economic impact for New York lawyers of expanded use of New York law).

VI. RECOMMENDATIONS OF TASK FORCE

The Task Force's recommendations focus on the following areas: (1) allowing foreign lawyers to sit for the Texas bar exam under rules generally comparable to those used by New York and California,⁹ (2) strength-

7. See Task Force Report on International Law Practice in Texas (December 2012), p. 29-30.

8. I have been asked about the potential for distortions of the Texas legal labor market (consisting of approximately 95,000 licensed Texas attorneys) stemming from the improved eligibility of foreign lawyers to sit for the Texas Bar, and I am confident that the impact is overwhelmingly positive. The benefits to the state are significant and include the establishment of long term personal and commercial relationships for Texas with well trained and bright young lawyers who are likely to go on to hold leadership positions in their home countries, where they have the advantage of common language, family and friends, and culture. To my knowledge, neither New York nor California has experienced material labor distortions stemming from their rules, and in fact have also benefitted. Moreover, one would expect it would take Texas numerous years to overcome a long standing policy of having a relatively closed system for admission of foreign lawyers. Moreover, the general career track contemplates two years in the United States—one for study and one year of training in a law firm willing to hire the candidate. In addition, the bar passage rate for these candidates has historically been lower than their JD counterparts due in part to linguistic and cultural reasons. As a result, only a small percentage of these foreign lawyers are able to obtain employment for the OPT year of training and the vast majority would then return home where their best professional opportunities lie.

9. The proposed Texas rules are still less open than New York's rules (at least as to law graduates of common law legal systems as described below) and rely more on licensing in a foreign country rather than foreign legal studies (albeit typically with an LL.M. for civil law country candidates). Under the proposed rules, eligible lawyers from common law countries with practice experience in three out of the last five years actively and substantially engaged in the lawful practice of law

ening curricular requirements for LL.M. graduates largely in line with the New York requirements; (3) allowing licensure in Texas based on holding an Optional Practical Training authorization, as is common in New York and California; (4) refining Texas' FLC rules to promote greater use of the rules, ensure appropriate access to privileges and immunities, particularly by in-house counsel, and facilitate renewal of FLC certification; and (5) applying Texas' *pro hac vice* admission rule to foreign attorneys.

A. PROPOSED RULE XIII—ELIGIBILITY TO SIT FOR THE BAR

Rule XIII addresses, among other things, the standards governing the ability of applicants from foreign jurisdictions to sit for the Texas bar exam.¹⁰ Under proposed Rule XIII, foreign lawyers who have received their legal training in a civil law jurisdiction may sit for the bar exam if they have completed a three-year course of study at a law school accredited in a foreign jurisdiction, have an approved LL.M. degree in the U.S., and are authorized to practice law in a foreign jurisdiction or in another state in the U.S.¹¹

In contrast, for lawyers from common law countries, the Task Force recommended that applicants be eligible to sit for the bar under any of the following routes:

- i Applicants must (a) have a degree from a three-year law school accredited in a foreign jurisdiction, (b) be authorized to practice in a foreign jurisdiction or in another state, and (c) have been actively and substantially engaged in the lawful practice of law for at least three of the last five years;
- ii Applicant must (a) have completed a two-year course at a law school accredited in a foreign jurisdiction and (b) have an approved LL.M. degree; or
- iii Applicant must (a) be authorized to practice law in a common law jurisdiction or another state in the U.S., and (b) have an approved LL.M. degree.

B. PROPOSED RULE XIV—FLCs

An FLC is an attorney who is licensed to practice law in a foreign jurisdiction and certified by the BLE to practice the foreign jurisdiction's law in Texas. An FLC may provide limited consulting services in Texas with

would also be eligible to sit for the bar exam. This is the only practice requirement in the proposed rules. Practice requirements can be a greater barrier to eligibility than one might imagine, as every link in the chain of employment during the applicable period must be documented. This level of documentation is often time consuming for the applicant and the regulatory body administering the rule.

- 10. Under certain circumstances, Texas rules allow admission without examination for lawyers licensed in another state who hold a JD. Although some members favored it, the Task Force did not recommend such admission for a foreign lawyer with an LL.M. degree and a New York Bar license, for example.
- 11. These requirements are in addition to general rules for all applicants for the Texas Bar, including but not limited to passing character and fitness background checks. Common law candidates must also meet these other requirements.

respect to the law of the foreign jurisdiction in which the FLC is licensed. FLCs can be a valuable resource to a business or law firm that deals with cross-border transactions, international trade, or other international issues. There are currently 28 Texas FLCs from the following countries: Argentina, Australia, Colombia, England/Wales, Greece, Mexico, Netherlands, Portugal, Sri Lanka, and Venezuela.¹² The Task Force concluded that participation in the FLC program could be increased, without compromising the integrity of the program, by modifying some of the general requirements for FLCs and reducing the administrative burden on the applicants and the BLE without undermining the BLE's ability to assess applicants' qualifications.¹³

C. RULE XIX-*PRO HAC VICE* ADMISSION

The Task Force unanimously recommended modifications to existing Rule XIX to allow *pro hac vice* admission for foreign attorneys. This modification can be accomplished by extending *pro hac vice* admission to an attorney licensed in a foreign jurisdiction as well as another state. This recommendation is based on ABA Model Rule 107C on Pro Hac Vice, which the ABA House of Delegates adopted in February 2013 as part of the ABA 2020 Commission on Ethics addressing the globalization of law practice.¹⁴ But the Task Force's proposal is different from the Model Rule to the extent it carries over existing Rule XIX's requirements for the lawyer admitted *pro hac vice* to work with Texas counsel and petition the applicable court for *pro hac vice* approval.

D. CURRICULAR CHANGES

Given the importance of the LL.M. degree to these reforms, the Task Force also examined the LL.M. curricular requirements and proposed strengthening these requirements in several ways. The changes in this area recommended by the Task Force include the following:

- i Requirement to complete coursework consisting of:
 - (a) Professional Responsibility (2 credit hours);
 - (b) American Legal Studies (2 credit hours); and
 - (c) Legal Research, Writing, and Analysis (2 credit hours);
- ii Requirement to successfully complete six credit hours in other courses tested on the Texas Bar; and
- iii Completion of at least 24 credit hours must be taken in the U.S.

12. For more information on FLCs registered in Texas, see http://www.texasbar.com/AM/Template.cfm?Section=Foreign_Legal_Consultants.

13. In contrast, as of March 2013, California has 55 FLCs from 27 countries. See <http://admissions.calbar.ca.gov/Requirements/ForeignLegalConsultantsFLC.aspx> for more information as to California FLCs.

14. See article published in ABA Journal entitled "Model Rule Changes Guide Judges Considering Pro Hac Vice Admission for Foreign Lawyers," dated February 11, 2013 published in website edition of ABA Journal.

These recommendations closely track the updated New York rule¹⁵ and, to an extent, the ABA Model Rule.¹⁶

VII. CONCLUSION

The Task Force unanimously concluded that the proposed reforms would generate a variety of benefits for the State of Texas including: (1) improvement of Texas' position in the globalized economy; (2) improved access by Texas businesses to international legal resources, international markets, and foreign lawyers; (3) extension of the BLE's oversight for a broader population of foreign attorneys who are believed to be working in Texas and outside the regulatory system; (4) creation of a more transparent regulatory system whereby foreign attorneys are registered and licensed in Texas, pay regular bar dues, take CLE courses, and are subject to Texas ethics rules; (5) facilitation of the handling of transactions and cross-border disputes by allowing foreign attorneys to work in Texas as required to meet client needs; (6) provision of a mechanism for foreign attorneys to develop ties and loyalties to the State of Texas and the State Bar of Texas; and (7) improvement of consumer choice and fostering of competition in the cross-border legal services market.¹⁷

15. See NY Rule 520.6, entitled "Study of law in foreign country; required legal education."

16. In this area, the Task Force preferred the slightly more flexible approach of the New York Rules, and also weighed the need to stay competitive with the *de facto* market leader New York.

17. See Final Task Force Report on International Law Practice in Texas, p. 52.

Articles

